

1 to residuals from a gunshot wound to the left hip. AR 333-35, 441. After being denied both
2 initially and upon reconsideration, Plaintiff requested a hearing before an Administrative Law
3 Judge ("ALJ"). AR 237. On March 24, 2004, ALJ Patricia Leary Flierl held a hearing. AR 436-
4 62. On August 19, 2004, ALJ Leary Flierl found that Plaintiff was not disabled. AR 14-17. On
5 April 1, 2005, the Appeals Council denied review. AR 7-9.

6 **Hearing Testimony**

7 ALJ Leary Flierl held a hearing on March 24, 2004, in Fresno, California. Plaintiff
8 appeared along with his attorney, Dennis Bromberg. AR 438.

9 Plaintiff was born on June 5, 1965, is 5'3" tall and weighs 155 pounds. AR 438-439.
10 Plaintiff immigrated to the United States from Cambodia on August 16, 1984. AR 439. In 1982,
11 while attempting to cross the Thailand-Cambodian border, Plaintiff suffered a gunshot wound to
12 the hip. AR 411. Plaintiff underwent surgical removal of one bullet and a small bullet still
13 remains. AR 411.

14 Plaintiff has not worked since 1986 or 1987. AR 441. His current source of income is
15 food stamps. AR 456. Plaintiff testified that he started receiving SSI benefits sometime around
16 1984-1985 and stopped receiving benefits sometime around 2001-2003. AR 460. Plaintiff
17 explained that he did not attend a hearing on the matter because he was sick. AR 460.

18 Plaintiff obtained four years of education in Cambodia. AR 439. Plaintiff learned to
19 speak English by talking to people, by attending an adult school ESL class, and by watching
20 television. AR 439. Plaintiff cannot write in English and he cannot understand a basic
21 newspaper article. AR 440.

22 Plaintiff has lived with his girlfriend and her two daughters, ages seventeen and fourteen,
23 for the past seven years. AR 448-449, 456. His girlfriend is on SSI and the daughters go to
24 school. AR 449. For the past nine or ten months, the couple has resided in an upstairs
25 apartment. AR 457. Plaintiff plans on moving to a downstairs apartment because he experiences
26 difficulty climbing the stairs. AR 457.

27 Plaintiff's activities include: cooking two or three times a week; going to dinner with
28 friends and family once every two weeks; walking ten to twenty minutes per day as instructed by

1 his doctor; packaging laundry; and driving approximately five times per week. AR 450-452.
2 Plaintiff drives to the store and to Temple. AR 453. Plaintiff also reads magazines in
3 Cambodian for thirty minute intervals. Plaintiff explained that he cannot read longer than that
4 because he becomes tired and his eyes are going bad. AR 455.

5 Plaintiff testified that he goes to Temple every Saturday and Sunday. AR 449-450.
6 Plaintiff explained a friend usually takes him and that the services are an hour to two hours long.
7 AR 450. Plaintiff testified that he cannot sit for too long, therefore he gets up after thirty
8 minutes, stands for five minutes, then sits back down. AR 450.

9 Plaintiff experiences pain in his left hip that “comes and goes” approximately four days
10 per week. AR 442. His pain is worse when the weather is cold. AR 442. Plaintiff testified that
11 he can only sit for thirty minutes before having to get up due to pain in his buttock, which he
12 described as, “you know, the small, the right, you know ... it’s very small.” AR 442-443.
13 Plaintiff also testified that he experiences difficulty walking, standing, and picking up heavy
14 items. AR 443-446. Plaintiff tires easily, experiences headaches approximately two times per
15 week, and cannot pick up a 10-pound bag of potatoes. AR 454, 446.

16 Plaintiff brought a cane with him to the hearing. AR 433. He explained that he was
17 given a cane in Long Beach in 1984 or 1985 and that U.M.C. gave him a new one. AR 433.
18 Plaintiff testified that he uses the cane “most of the time;” that he sometimes walks without the
19 cane but has to hold onto something; and that he sometimes walks without the cane and without
20 holding onto something, but that it is “kind of hard” for him. AR 444. Plaintiff also testified that
21 he cannot walk without his cane. AR 445. Additionally, Plaintiff testified that he can walk half
22 a block before he has to sit down. AR 445. Plaintiff walks everyday. AR 445. Plaintiff can
23 stand for five minutes without his cane and then must sit down. AR 446.

24 Plaintiff takes the following medications: Neurontin, Amitriptyline, Kreppa, Imipramine,
25 Mapap, Ultram, and Vicodin. AR 447-455. Plaintiff takes most of the medications as needed for
26 pain. AR 448. Plaintiff takes Amitriptyline to help him sleep. AR 448. Plaintiff does not nap
27 during the day. AR 448.

28 Plaintiff receives his medical treatment at University Medical Center. AR 458. Plaintiff

has been seen by Dr. Brukowitz, Dr. Dizan, Dr. Nigwilliam, and Dr. Felmos (now retired). AR 458. Plaintiff testified that he went to one physical therapy session and denied being informed that he needed to continue going. AR 459-460. Plaintiff testified that after the therapy session, he resumed seeing his own doctor. AR 460.

Medical Evidence

On June 5, 2001, Plaintiff complained of pain and received an X-ray of his left hip. AR 393. The conclusion was "negative." AR 393. The X-ray revealed no bone or joint abnormalities and the soft tissues were clear. AR 393. That same day, Plaintiff received a lumbar spine X-ray. AR 392. The conclusion was "essentially negative." AR 392. The X-ray revealed the AP, lateral and both oblique views showing no significant bony abnormalities. AR 392. The X-ray note also indicated, "Minimal wedge deformity of the bodies of L1, L2, and L3 is developmental. Discs are normal in height. Apophyseal and sacroiliac joints are clear." AR 392.

On November 27, 2001, Plaintiff arrived at Community Medical Center complaining of left hip pain at a level "10" on a scale of "1-10." AR 388. An examination revealed decreased sensation in the left hip and decreased flexion and knee extension. AR 391.

On June 5, 2002, Plaintiff arrived at Community Medical Center complaining of left hip pain. AR 385. An examination revealed tenderness in the soft-tissue of the hip and limited range of motion. AR 385.

On July 21, 2002, Plaintiff arrived at Community Medical Center complaining of on-going left hip pain and inability to sleep. AR 374. Plaintiff rated his pain an "8" on a scale of "1-10." AR 374. An examination revealed tenderness in the lower extremities, limited range of motion of his left hip and an antalgic gate. AR 379.

On September 19, 2002, Plaintiff arrived at Community Medical Center complaining of left hip pain and inability to bear weight on his left hip. AR 367. Plaintiff rated his pain an "8" on a scale of "1-10." An examination revealed tenderness in his lower extremities. AR 367. He was given Vicodin. AR 368, 370.

On September 23, 2002, Plaintiff was examined at Community Medical Center and

1 referred to pain management. AR 429. An E.M.G. was also recommended. AR 429. An
2 examination revealed that his muscle strength and range of motion were within the functional
3 limits, although he demonstrated an abnormal gait on the left side and experienced limited
4 sensation in the left thigh. AR 430-31. On a scale of "1-5," 1 meaning *easy* and 5 meaning
5 *difficult*, Plaintiff rated the following activities "2-3": washing; dressing; hair care; walking
6 fifteen minutes; climbing steps/stairs; sitting thirty minutes; standing twenty to twenty five
7 minutes; sleeping; transfers in and out of bed and car; squatting; crouching; kneeling; pushing;
8 pulling; and lifting ten to fifteen pounds. Plaintiff rated the following activities a "1": reaching;
9 buttoning; writing; picking up coins; handling objects; moving objects; carrying objects; putting
10 dishes/groceries away; house work; and yard work. Plaintiff rated housework and cooking a "3"
11 and rated working, sports, recreation, and hobbies both a "2 and 5." AR 433. The assessor noted
12 that Plaintiff may be motivated by secondary gain. AR 432.

13 On October 21, 2002, medical records indicate that Plaintiff complained of left hip pain
14 and depression. AR 427. Plaintiff was prescribed Neurontin (330 mg), with the possibility of an
15 increase in dosage to 600 mg. AR 427. Plaintiff's prescription for Elavil was increased to 50
16 mg. Plaintiff was referred to neurology. AR 428.

17 On November 20, 2002, Plaintiff was discharged from physical therapy due to
18 nonattendance. AR 435. The report indicates Plaintiff attended one scheduled physical therapy
19 appointment between September 23, 2002 and November 20, 2002. AR 435.

20 In December 2002, a U.M.C. Adult Health Progress Record indicates that Plaintiff was
21 taking Tylenol for pain. AR 425. At this exam, Plaintiff complained of itchy eyes and throat and
22 requested refills on his prescription. AR 425. Plaintiff indicated that Neurontin was helpful in
23 alleviating his pain and Elavil was helping him sleep. AR 425. Plaintiff's Neurontin dosage was
24 increased to 600 mg and his Elavil prescription was refilled. AR 425.

25 On January 13, 2003, an orthopedic consultation was performed at Valley Heath
26 Resources in Fresno at the request of the Department of Social Services. AR 394. Plaintiff's
27 chief complaint was left hip pain. AR 394. An interpreter was deemed necessary for the
28 evaluation. AR 394. Plaintiff reported that a bomb went off, causing injury to his left leg. AR

1 394. The record states that Plaintiff had previously underwent a debridement of his left hip. AR
2 394. Plaintiff reported taking Amitriptyline, MAPAP and Ibuprofen. AR 394. Plaintiff walked
3 with a slight limp only on the right side. AR 395. Plaintiff could “stand on his toes and heels
4 well with difficulty.” AR 395. The examination also revealed that Plaintiff’s flexion, right
5 rotation, left rotation, and later flexion of his cervical spine and lumbar spine were within the
6 normal limits. AR 395. The report notes the “contour, curvature and alignment of the cervical
7 spine is normal. No spasm or tenderness present ... No tenderness to percussion in the lumbar
8 area of the spine. No sciatic notch tenderness on either side. No sacroiliac joint tenderness on
9 either side.” AR 395. Additionally, Plaintiff’s “straight leg raising is to 80 degrees bilaterally
10 without pain.” AR 395. An examination of Plaintiff’s Upper and Lower Extremities revealed
11 findings within the normal limits. AR 396. Dr. Troy Smith concluded, “At the present time the
12 patient is unable to do work which requires repeated bending or heaving lifting. The patient can
13 lift 50 pounds occasionally 25 pounds frequently. The patient can sit, stand and walk six hours
14 out of an eight hour day with normal breaks. The patient can kneel, squat and climb stairs. He
15 does not need to use a cane for regular activities but may need to use a cane if he does any
16 prolonged standing or walking.” AR 398.

17 On January 28, 2003, James Glaser, M.D., a state agency physician, reviewed Plaintiff’s
18 medical records and agreed essentially with Dr. Smith’s conclusions, adding a postural limitation
19 of “stooping occasionally.” AR 401-410.

20 On March 10, 2003, Plaintiff reported he was taking Motrin and Neurontin and that
21 Neurontin was helping. AR 424. At this time, his prescriptions were filled and an E.M.G. was
22 recommended. AR 424.

23 On March 11, 2003, Plaintiff received an X-ray of his hip. The results were negative.
24 AR 393.

25 On March 21, 2003, Brian Ginsburg, M.D. reviewed Plaintiff’s medical records and came
26 to the same conclusion as Dr. Smith. AR 399-00, 410.

27 In March 2003, an E.M.G. was requested and denied. AR 422. The reviewer questioned
28 how an E.M.G. would alter the management of the Plaintiff’s problem or enhance his treatment.

1 AR 422.

2 On April 14, 2003, Plaintiff complained of leg pain and was prescribed Neurontin. AR
3 412.

4 On May 15, 2003, Plaintiff was referred to a nuerologist to address his pain complaint.
5 AR 417.

6 In October 2003, Plaintiff underwent a neurological examination. AR 415. The
7 examination revealed that Plaintiff had clear sensorium, normal reflexes and strength, was very
8 muscular, had a two degree antalgic gait due to his left hip, slight left bottom atrophy, and
9 decreased sensation and range of motion associated with his left thigh. AR 415. Plaintiff was
10 prescribed Neurontin and Elavil. AR 415.

11 _____An Adult Heath Progress Record dated October 14, 2003, indicates Plaintiff had
12 previously had been taking Motrin for ten years but stopped in 2002 due to stomach upset. AR
13 415. At the date of this record, Plaintiff was taking 900 mg of Neurontin and 50 mg of Elavil
14 and Tylenol for pain. AR 415. A notation at the bottom of the record reads, "10/14/03 Staff- I
15 am unconvinced of the necessity to Rx this long standing problem with narcotics." AR 415.

16 _____On November 7, 2003, Plaintiff was taking several medications prescribed by different
17 doctors. AR 363. Plaintiff was taking 600 mg of Neurontin and 500 mg of MAPAP, prescribed
18 by Dr. Dizon; 300 mg of Neurontin and 500 mg of Amitriptyline, prescribed by Dr. Flemus; 10
19 mg of Imiprumine, prescribed by Dr. Nguyen; and 50 mg of Ultram, prescribed by Dr.
20 Berkowitz. AR 363.

21 On December 5, 2003, Plaintiff complained of neuropathic pain in his left hip. AR 413.
22 The neurologist recommended lifelong treatment. AR 413-14. Plaintiff was prescribed Vicodin
23 and referred to a pain management clinic. AR 413.

24 **ALJ's Findings**

25 _____The ALJ found that Plaintiff has residuals from a gunshot wound to his left hip, which are
26 "severe" impairments as defined in the regulations and rulings. AR 14.

27 The ALJ also found that Plaintiff does not have any impairment or combination of
28 impairments satisfying the criteria set forth in any section of Appendix 1, Subpart P, Regulation

1 No.4. AR 14.

2 In addition, the ALJ determined that Plaintiff's impairments are not as limiting as he
3 alleges. AR 15. Based on this, the ALJ found that Plaintiff retained the residual functional
4 capacity (R.F.C.) to perform sedentary work. AR 16.

5 Considering Plaintiff's R.F.C., age, education, and work experience, the ALJ concluded
6 that Plaintiff could perform work existing in significant numbers in the national economy and
7 therefore was not disabled. AR 16.

8 **SCOPE OF REVIEW**

9 Congress has provided a limited scope of judicial review of the Commissioner's decision
10 to deny benefits under the Act. In reviewing findings of fact with respect to such determinations,
11 the Court must determine whether the decision of the Commissioner is supported by substantial
12 evidence. 42 U.S.C. 405 (g). Substantial evidence means "more than a mere scintilla,"
13 *Richardson v. Perales*, 402 U.S. 389, 402 (1971), but less than a preponderance. *Sorenson v.*
14 *Weinberger*, 514 F.2d 1112, 1119, n. 10 (9th Cir. 1975). It is "such relevant evidence as a
15 reasonable mind might accept as adequate to support a conclusion." *Richardson*, 402 U.S. at
16 401. The record as a whole must be considered, weighing both the evidence that supports and
17 the evidence that detracts from the Commissioner's conclusion. *Jones v. Heckler*, 760 F.2d 993,
18 995 (9th Cir. 1985). In weighing the evidence and making findings, the Commissioner must
19 apply the proper legal standards. *E.g., Burkhardt v. Bowen*, 856 F.2d 1335, 1338 (9th Cir. 1988).
20 This Court must uphold the Commissioner's determination that the claimant is not disabled if the
21 Secretary applied the proper legal standards, and if the Commissioner's findings are supported by
22 substantial evidence. *See Sanchez v. Sec'y of Health and Human Serv.*, 812 F.2d 509, 510 (9th
23 Cir. 1987).

24 **REVIEW**

25 In order to qualify for benefits, a claimant must establish that he is unable to engage in
26 substantial gainful activity due to a medically determinable physical or mental impairment which
27 has lasted or can be expected to last for a continuous period of not less than 12 months. 42
28 U.S.C. § 1382c (a)(3)(A). A claimant must show that he has a physical or mental impairment of

1 such severity that he is not only unable to do his previous work, but cannot, considering his age,
 2 education, and work experience, engage in any other kind of substantial gainful work which
 3 exists in the national economy. *Quang Van Han v. Bowen*, 882 F.2d 1453, 1456 (9th Cir. 1989).
 4 The burden is on the claimant to establish disability. *Terry v. Sullivan*, 903 F.2d 1273, 1275 (9th
 5 Cir. 1990).

6 In an effort to achieve uniformity of decisions, the Commissioner has promulgated
 7 regulations which contain, inter alia, a five-step sequential disability evaluation process. 20
 8 C.F.R. §§ 404.1520 (a)-(f), 416.920 (a)-(f) (1994).² Applying this process in this case, the ALJ
 9 found that Plaintiff: (1) had not engaged in substantial gainful activity since the alleged onset of
 10 disability; (2) has an impairment that is considered “severe” (residuals from a left hip gunshot
 11 wound) based on the requirements in the Regulations (20 CFR §§ 416.920(b)); (3) does not have
 12 an impairment or combination of impairments which meets or equals one of the impairments set
 13 forth in Appendix 1, Subpart P, Regulations No. 4; (4) has no past relevant work experience; and
 14 (5) retains the R.F.C. to perform a full range of sedentary work. AR 14.

15 Plaintiff argues that the ALJ (1) failed to give clear and convincing reasons for rejecting
 16 Plaintiff’s testimony regarding the severity of his symptoms; (2) failed to give specific and
 17 legitimate reasons for disregarding the opinions of the consultative examiner and state agency
 18 physician; (3) overlooked significant relevant evidence in determining Plaintiff’s R.F.C.; and (4)
 19 erred by failing to elicit the testimony of a vocational expert.

20 DISCUSSION

21 A. Plaintiff’s Testimony

22 _____Plaintiff contends that the ALJ failed to give clear and convincing reasons for rejecting
 23 Plaintiff’s testimony regarding the severity of his symptoms.

24 _____The ALJ is required to make specific findings assessing the credibility of Plaintiff’s
 25 subjective complaints. *Cequerra v. Secretary of HHS*, 933 F.2d 735 (9th Cir. 1991). In rejecting
 26 the claimant’s testimony, “the ALJ must identify what testimony is not credible and what
 27 _____

28 ²All references are to the 2002 version of the Code of Federal Regulations unless otherwise noted.

evidence undermines the claimant's complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996) (quoting *Varney v. Secretary of Health and Human Services*, 846 F.2d 581, 584 (9th Cir. 1988)). Pursuant to Ninth Circuit law, if the ALJ finds that the claimant's testimony as to the severity of his pain and impairments is unreliable, the ALJ must make a credibility determination with findings sufficiently specific to permit the court to conclude that the ALJ did not arbitrarily discredit claimant's testimony. *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002).

"The ALJ may consider at least the following factors when weighing the claimant's credibility: '[claimant's] reputation for truthfulness, inconsistencies either in [claimant's] testimony or between [his] testimony and [his] conduct, [claimant's] daily activities, [his] work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which [claimant] complains.'" *Id.* (citing *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997)). "If the ALJ's credibility finding is supported by substantial evidence in the record, we may not engage in second-guessing." *Id.*

Plaintiff contends that "once a claimant submits objective medical evidence establishing an impairment that could reasonably be expected to cause some pain, 'it is improper as a matter of law for an ALJ to discredit excess pain testimony solely on the grounds that it is not fully corroborated by objective medical findings.'" *Cotton v. Bowen*, 799 F.2d 1403, 1407 (9th Cir. 1986). Based on this, Plaintiff argues that the ALJ erred by improperly determining that objective evidence regarding Plaintiff's chronic neuropathic pain syndrome and degenerative joint disease did not support Plaintiff's allegation regarding the severity of his symptoms. This argument is without merit.

First, the ALJ gave adequate reasons for rejecting Plaintiff's testimony and did not rely *solely* on objective medical evidence. The ALJ began her credibility analysis by recognizing that Plaintiff's impairments "could reasonably be expected to produce some of the symptoms he alleges, but the degree of his limitations is not supported by the objective medical evidence *and* is not entirely credible when evaluated under Social Security Ruling 96-7 p." (emphasis added) AR 15. The ALJ noted that a therapist reported a poor or fair prognosis because of questionable motivation for secondary gain; that during a claims interview, the claims representative observed

1 that Plaintiff had no physical difficulties; that Plaintiff does not always take his medications; and
2 that Plaintiff was discharged from therapy because of nonattendance. AR 15. *See Sample v.*
3 *Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982) (an ALJ is entitled to draw inferences logically
4 flowing from the evidence). Furthermore, the ALJ properly took into account Plaintiff's *daily*
5 *activities* in making her determination. *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002);
6 (citing *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997)). For example, the ALJ noted
7 that Plaintiff cooks several times a week, drives a car approximately five times a week, and goes
8 out to dinner. AR 15. Moreover, if a claimant is able to spend a substantial part of his day
9 engaged in pursuits involving the performance of physical functions that are transferable to a
10 work setting, a specific finding as to this fact may be sufficient to discredit a claimant's
11 allegations. *See Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.1989).

12 Second, the ALJ properly considered the medical findings *in addition* to other evidence
13 on record. The ALJ noted that medical evidence between September 2002 through December
14 2003 showed that Plaintiff was treated for left hip pain. AR 15. Furthermore, the ALJ discussed
15 the January 2003 medical report by Dr. Smith in which he concluded that Plaintiff was able to lift
16 and carry 50 pounds occasionally and 25 pounds frequently and sit, stand and/or walk 6 hours in
17 an 8-hour workday with bending occasionally. AR 15. The ALJ also noted that the state agency
18 medical consultants found that Plaintiff had the R.F.C. capacity to perform medium work with
19 stooping occasionally. AR 15. *Thomas, supra* (citing *Light v. Soc. Sec. Admin.*, 119 F.3d 789,
20 792 (9th Cir. 1997)).

21 Third, Plaintiff incorrectly argues that SSR 96-7p sets forth a mandatory procedure
22 through which an ALJ must assess the claimant's credibility. While courts give the SSRs some
23 deference, they do not have the force of law. *Holohan v. Massanari*, 246 F.3d 1195, 1203, n.1
24 (9th Cir. 2001).

25 Fourth, Plaintiff argues that the ALJ erred by failing to mention medical evidence during
26 the years 2001 and 2002. While it is true that the ALJ is required to consider the entire record,
27 the ALJ is not required to list every piece of medical evidence in her decision. In any event, a
28 review of the medical evidence between the years 2001-2002 reveals that Plaintiff's chief

1 complaint was left hip pain– the same complaint Plaintiff alleges in the years that follow.
2 Furthermore, there is no indication that Plaintiff’s injury or related pain was worse during this
3 time period.

4 Fifth, Plaintiff argues that the ALJ had a duty to develop the record. “An ALJ’s duty to
5 develop the record further is triggered only when there is ambiguous evidence or when the record
6 is inadequate to allow for proper evaluation of the evidence.” *Mays v. Massanari*, 276 F.3d 453,
7 460 (9th Cir. 2001). In this case, there is no suggestion of an ambiguous or inadequate record.
8 As Plaintiff fails to demonstrate grounds to develop the record further, this argument fails.

9 Plaintiff’s overall contention appears to be that the ALJ erred because evidence exists
10 supporting his claim of disability. However, this is not the correct standard of review. Plaintiff
11 will not prevail simply because there is evidence supporting his position. *Richardson v. Perales*,
12 402 U.S. at 399; *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982). Rather, the decision of
13 the Commissioner to deny benefits will be overturned only if it is not supported by substantial
14 evidence or is based on legal error. *Matney v. Sullivan* 981 F.2d 1016, 1019 (9th Cir. 1992).

15 **B. Medical Opinions**

16 Plaintiff argues that the ALJ failed to give specific and legitimate reasons for disregarding
17 the opinions of the consultative examiner and state agency physician. This argument is without
18 merit.

19 In regards to medical opinions, the medical opinion of a claimant’s treating physician is
20 entitled to “special weight.” *Embrey v. Bowen*, 849 F.2d 418, 421 (9th Cir. 1988); *Valencia v.*
21 *Heckler*, 751 F.2d 1082, 1088 (9th Cir. 1985). Reliance on the opinion of the treating physician
22 is based not only on the fact that he is employed to cure but also on his greater opportunity to
23 observe and know the patient as an individual. However, a treating physician’s opinion is not
24 conclusive as to a physical condition or the ultimate issue of disability. *Magallanes*, 881 F.2d at
25 751, and *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992). An ALJ may reject a
26 contradicted treating physician’s opinion on the basis of clear findings that set out specific,
27 legitimate, reasons for the rejection. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). A
28 statement by a physician indicating a claimant is “disabled” does not mean that the Secretary will

1 concur, absent review of medical findings and other evidence. 20 C.F.R. 416.927(e).

2 “Conclusory opinions by medical experts regarding the ultimate question of disability are not
3 binding on the ALJ.” *Nyman v. Heckler*, 779 F.2d 528 (9th Cir. 1985).

4 In this case, the ALJ properly considered the consultive examiner’s opinions and the state
5 agency medical consultants’ opinions in determining Plaintiff’s residual functional capacity. Dr.
6 Smith’s occasional bending limitation and Dr. Glasser’s limitation for occasional stooping is
7 accounted for in the ALJ’s determination that Plaintiff retains an R.F.C. capacity for sedentary
8 work. According to SSR 83-14, sedentary work includes occasional bending and occasional
9 stooping, which does not contradict the medical opinions at issue. However, even if the state
10 agency medical consultants had concluded that the Plaintiff was disabled, the ALJ is not bound
11 to accept that finding. 20 C.F.R. 416.927(e).

12 **C. R.F.C.**

13 Plaintiff argues that the ALJ failed to consider Plaintiff’s difficulty concentrating and
14 Plaintiff’s inability to sit, in determining Plaintiff’s R.F.C. In doing so, Plaintiff lists the
15 common side effects of his medications to include: sedation; drowsiness; disturbed
16 concentration; excitement; anxiety; insomnia; fatigue; headaches; and weakness. This argument
17 is without merit.

18 Plaintiff is correct, that according to SSR 83-12, if an individual is able to sit for a period
19 of time, but must then get up and walk for awhile before returning to sitting, he is not
20 functionally capable of doing the necessary sitting contemplated in the definition of sedentary
21 work. However, Plaintiff’s allegations of limited ability to sit and concentrate are based on his
22 testimony, which is subject to the ALJ’s credibility determination.

23
24 “If an ALJ’s credibility finding is supported by substantial evidence in the record, a
25 reviewing court may not engage in second-guessing.” *Thomas, supra* (citing *Light v. Soc. Sec.*
26 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997)). A reviewing court will not reverse an ALJ’s
27 credibility determinations “based on contradictory or ambiguous evidence.” *Johnson v. Shalala*,
28 60 F.3d 1428, 1434 (9th Cir. 1995) (citing *Allen v. Heckler* 749 F.2d 577, 579 (9th Cir. 1984)).

1 “So long as the adjudicator makes specific findings that are supported by the record, the
2 adjudicator may discredit the claimant’s allegations based on inconsistencies in the testimony or
3 on relevant character evidence.” *Bunnell v. Sullivan*, 947 F.2d 341, 346 (9th Cir. 1991).
4 Moreover, “the ALJ is entitled to draw inferences ‘logically flowing from the evidence.’” *Macri*
5 *v. Chater*, 93 F.3d 540, 544 (9th Cir. 1996) (quoting *Sample v. Schweiker*, 694 F.2d 639, 642 (9th
6 Cir. 1982)).

7 In making her determination, the ALJ considered Dr. Smith’s report, which indicated that
8 Plaintiff could “sit, stand and/or walk 6 hours in an 8-hour workday.” (emphasis added) AR 15.
9 The ALJ also noted the state agency medical consultants’ evaluation, which made no limitation
10 for sitting or concentrating. AR 15. In addition, the ALJ considered non-medical evidence,
11 including Plaintiff’s testimony. Accordingly, the Court will not further evaluate the ALJ’s
12 decision to discredit Plaintiff’s allegations of difficulty sitting and concentrating.

13 Insofar as Plaintiff argues the ALJ failed to take into account possible side effects of
14 Plaintiff’s medications, his argument fails. It is true that side effects of prescribed medication
15 may have a significant impact on an individual’s ability to work, and therefore should be
16 considered in making a disability determination. *Varney v. Secretary of Health & Human Serv.*,
17 846 F.2d 581, 585 (9th Cir. 1988). However, the side effects listed by Plaintiff’s counsel are
18 merely *potential* side effects. According to Plaintiff’s testimony, the only side effect he has
19 experienced is stomach upset, which he described as “annoying.” AR 447. There is no
20 indication that this stomach upset affects Plaintiff’s ability to work, let alone has a significant
21 impact on it.

22 Finally, Plaintiff argues that the ALJ failed to take into account Plaintiff’s left buttock
23 atrophy in determining Plaintiff’s residual functional capacity. Plaintiff notes that on October 14,
24 2003 and October 21, 2003, Plaintiff was examined at University Medical Center and the
25 examinations revealed buttock atrophy. AR 415. The Court acknowledges that these medical
26 records indicate muscle atrophy. However, the records fail to indicate that Plaintiff suffers any
27 impairments as a result. AR 415. In addition, although Plaintiff testified that he cannot sit for
28

1 more than thirty minutes due to pain in his buttock and that one buttock is smaller than the other,
2 the ALJ properly discredited this testimony as discussed above. AR 442-443. Furthermore, even
3 if Plaintiff had demonstrated that the buttock atrophy results in an impairment, that alone is not
4 sufficient to sustain a finding of disability. *See Key v. Heckler*, 754 F.2d 1545, 1549 (9th Cir.
5 1985).

6 **D. Vocational Expert**

7 Plaintiff contends that the ALJ erred by failing to elicit the testimony of a vocational
8 expert, to describe what, if any, jobs existed in the national economy that Plaintiff would be able
9 to perform. The Court also rejects this contention. While significant non-exertional impairments
10 may make reliance on the grids inappropriate, the mere allegation of a non-exertional limitation
11 does not automatically preclude the application of the grids. *Desrosiers v. Secretary of Housing*
12 *and Health Services*, 846 F.2d 573, 577 (9th Cir. 1988). However, if the ALJ finds that a non-
13 exertional limitation exists, and that it significantly affects the range of work described in the
14 grids, use of the grids would be inappropriate and a vocational expert would be needed to
15 describe what, if any, jobs existed in the national economy that plaintiff would be able to
16 perform. *Id.*

17 In this case, the ALJ found that Plaintiff retains the R.F.C. for sedentary work,
18 unrestricted by non-exertional limitations. AR 16. In doing so, the ALJ considered Plaintiff's
19 subjective complaints but found them unsupported by the medical evidence and not entirely
20 credible when evaluated under Social Security Ruling 96-7p. AR 15. As previously stated, the
21 mere allegation of subjective complaints does not automatically give rise to a requirement to call
22 a vocational expert. *See Desrosiers v. Secretary of Housing and Health Services*, 846 F.2d at
23 557. Therefore, as the ALJ was not required to call a vocational expert in this situation,
24 Plaintiff's argument fails.

25 Finally, Plaintiff argues that if the ALJ had properly included Plaintiff's limitations for
26 occasional stooping and bending in the R.F.C. finding, she would have been required to call a
27 vocational expert. However, this Court finds that the ALJ properly considered Plaintiff's
28

1 limitations when making her R.F.C. determination. Therefore, it was appropriate for the ALJ to
2 apply the grids.

3 **CONCLUSION**

4 Based on the foregoing, the Court finds that the ALJ's decision is supported by
5 substantial evidence in the record as a whole and is based on proper legal standards.
6 Accordingly, this Court DENIES Plaintiff's appeal from the administrative decision of the
7 Commissioner of Social Security. The clerk of this Court is DIRECTED to enter judgment in
8 favor of Defendant Jo Anne B. Barnhart, Commissioner of Social Security and against Plaintiff,
9 Phia Heng.

10 IT IS SO ORDERED.

11
12 **Dated: February 16, 2006**
13 3b142a

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE